UNITED STATES BANKRUPTCY COURT
DISTRICT OF RHODE ISLAND

IN RE: Ernestina Garcia	CHAPTER 13 CASE NO. 09-10890-ANV

MEMORANDUM IN SUPPORT OF OBJECTION TO DEBTOR'S MOTION TO MODIFY SECURED CLAIM AND CONFIRMATION OF DEBTOR'S CHAPTER 13 PLAN

Now comes HSBC Bank U.S.A, National Association, as Trustee for Home Equity Loan Trust Series ACE 2006-HE1 (hereinafter "HSBC") and respectfully requests that this court deny the Debtor's Motion to Modify Secured claim and deny confirmation of the Debtor's Amended Chapter 13 Plan. HSBC files this Memorandum in support of its objection.

STATEMENT OF FACTS

HSBC is the holder of a first mortgage on the Debtor's property, a three-family dwelling located at 44 Union Avenue, Providence, RI 02909. HSBC, through its servicing agent, America's Servicing Company, filed a timely Proof of Claim (Claim No. 3) on April 2, 2009 claiming a total mortgage debt of $306,622.68 and pre-petition mortgage arrears of $51,217.06.

The mortgage secures an adjustable rate promissory note (the "note") which provides for an initial interest rate of 8.9%. The mortgage and applicable riders, note and assignment of mortgage are attached hereto as Exhibit A. Pursuant to the terms of the note, the interest rate changes on December 1, 2007 and on the first day of the month every six months thereafter. The note provides for a cap on the interest rate of 14.9%. As of July 1, 2009 the interest rate is 9.5% and the monthly payment is $2,564.75 which is comprised of $2,202.05 in principal and interest and $362.70 in escrow. The interest rate prior to the most recent change was 11% and the monthly mortgage payment from April 2009 to June 2009 was $2,840.85.

On May 26, 2009 the Debtor filed an Amended Chapter 13 Plan and Motion to Modify Secured Claim (Docket No. 25) which amended the debtor's original plan filed on April 13, 2009 (Docket No. 10). The plan attempts to bifurcate HSBC's secured claim by reducing the principal balance of the mortgage to $123,000.00 less the pre-petition arrearage. The total payment on this claim provided for in the plan is $63,641.82. Additionally, the plan seeks to reduce the contractual monthly payments to $600.00 which is calculated from the allowed secured claim of $71,782.94 amortized over the remaining twenty-six year term of the mortgage at 8.9% interest. HSBC, through its servicing agent, America's Servicing Company, filed a timely objection to the Debtor's Amended Plan (Docket No. 35) on June 12, 2009.

The April 2009 mortgage payment is the first post-petition payment and the loan remains due for that payment and all subsequent payments. There is currently $3,890.10 in the Debtor's suspense account. HSBC filed a Motion for Relief from Stay on May 29, 2009 (Docket No. 30) due to the post-petition default. That Motion is currently pending before this court.

ISSUES

1. Whether the debtor can amortize the secured portion of HSBC's claim after bifurcation, thereby changing the amount of the monthly mortgage payment, without paying the entire allowed secured claim within the term of the debtor's Chapter 13 plan.

2. Whether the debtor can subtract the pre-petition mortgage arrears from the value of the secured claim established by the court under 11 U.S.C. §506 in order to determine the

total amount of the allowed secured claim.

3. Whether the Debtor's Amended Chapter 13 Plan, as drafted, is feasible.

ARGUMENT

I. A CHANGE IN THE AMOUNT OF THE DEBTORS' MONTHLY MORTGAGE PAYMENT IS A MODIFICATION OF THE RIGHTS OF THE MORTGAGEE REQUIRING FULL PAYMENT OF THE ALLOWED SECURED CLAIM WITHIN THE TERM OF THE DEBTORS' CHAPTER 13 PLAN PURSUANT TO 11 U.S.C. §§1325(a)(5) and 1322(d)

The issue of whether the debtor can change the contractual monthly payments after bifurcation is currently under advisement with this court in the case of Anibal Nunez, et al. (Case No. 08-13265). There is a status check scheduled for July 20, 2009. This issue was briefed by both undersigned counsel and Debtor's counsel. It is HSBC's position that the debtor must pay the entire secured claim of $123,000.00 over the five-year term of the Chapter 13 Plan if the debtor wishes to change the monthly mortgage payments based on the value of the allowed secured claim after bifurcation. As drafted, the Debtor's Amended Chapter 13 Plan seeks to reduce the contractual monthly payments from $2,840.85 to $600.00 which is calculated from the allowed secured claim of $71,782.94 amortized over the remaining twenty-six year term of the mortgage at 8.9% interest.

In order to extend repayment of the modified claim beyond the term of the Chapter 13 Plan as the Debtor is proposing, the Debtor must cure the pre-petition arrears and provide for maintenance of payments to HSBC. *In re McGregor,* 172 B.R. 718 (Bankr. D. Mass.1994). See also *In re Kheng*, 202 B.R. 538 (Bankr. D.R.I. 1996) in which this court agreed with and adopted the analysis in *McGregor*. In order to have a maintenance of payments under 11 U.S.C. §1322(b)(5) the Debtor must make the same principal and interest payments called for under the note. *In re McGregor,* 172 B.R. at 721. In *McGregor*, the "maintenance of payments" provision of 11 U.S.C. §1322(b)(5) was explained as follows;

> A change in the amount of the monthly payments hardly constitutes "maintenance of payments." The phrase connotes an absence of change. If the payments are changed, sections 1322(c) and 1325(a)(5) both require that they be completed over the life of the plan, which cannot exceed five years. *See* Lundin, *supra,* § 4.49. *See also Legowski,* 167 B.R. 711, *In re Richards,* 151 B.R. 8 (Bankr.D.Mass.1993).
>
> The Debtor may nevertheless take advantage of 1322(b)(5) by keeping the same 10.5% contract rate and making the same payments of principal and interest called for by the note during the life of the plan and during such further period of time as is necessary to have the total principal payments equal the amount of the secured claim as valued by this court. There would then be "maintenance of payments." And those payments would be maintained on the "secured claim" as that claim is computed in accordance with section 506(a).

Id.

Additionally, the United States Bankruptcy Court for the District of New Hampshire recently addressed the issue of whether payment of a bifurcated claim can extend beyond the term of a Chapter 13 plan. *In re Plourde*, 2009 WL 612145 (Bankr. D.N.H. 2009). In the *Plourde* case, the debtors filed a Chapter 13 plan which sought to bifurcate the claim of the first mortgagee on the debtors' non-residential real property in Florida. In addition, the plan proposed to pay the secured claim over the life of the loan at an interest rate of 4.25%. Judge Vaughn stated that "[u]pon bifurcating a claim, a debtor has two options: (1) modify the terms of the claim, 11 U.S.C. § 1325(a)(5) or(2) cure the mortgage default within the plan period, 11 U.S.C. §

1322(b)(5). If the debtor chooses to modify the terms of the claim, he must pay the amount of the secured claim as valued by the court in full within the life of plan." *Id.* at 1. With respect to payments on the secured claim after bifurcation, Judge Vaughn held that "[a] change in monthly payments of principal and interest with respect to the allowed secured claim triggers § 1322(d), which requires the full amount of the secured claim to be paid over the life of the plan." *Id*. As the debtors in *Plourde* proposed to change the monthly payments of principal and interest by reducing the interest rate of the secured claim, the court held that the debtors must pay the entire portion of the secured claim in full during the life of the plan. *Id.*

In the present case, while the Debtor is not seeking to adjust the interest rate on the secured claim, the Debtor is seeking to modify the claim by recalculating the monthly mortgage payment based on the secured portion of the bifurcated claim. This is clearly a modification of the secured creditor's rights under the note and mortgage as the Debtor is modifying the payment terms. In *Nobelman v. American Savings Bank*, the Supreme Court stated that a mortgagee's "rights" are reflected in the mortgage and note and that one of these rights is the "repayment of principal in monthly installments over a fixed term at specified adjustable rates of interest". 508 U.S. 324, 329 113 S.Ct. 2106, 2111, 124 L.Ed. 2d 228 (1993). A recalculation of the monthly mortgage payment is a significant modification of HSBC's contractual right to repayment of its secured claim. The fact that the note provides for an adjustable rate of interest should have no bearing on HSBC's right to repayment of its allowed secured claim. The Debtor, however, in an effort to break away from the long line of cases that have prohibited such treatment in the context of a fixed rate mortgage[1], claims that the terms of the adjustable rate

[1] See *In re Legowski*, 167 B.R. 711, 716 (Bankr. D. Mass. 1994) (removal of the right to call a note is a

note permit such a modification. It is difficult to reconcile the disparity in treatment that would result if an adjustable rate mortgage could be reamortized post-bifurcation to a fraction of the contractual mortgage payment whereas a fixed rate mortgage would have to maintain the same contractual principal and interest payments throughout the life of the loan. Furthermore, the issue of reamortization of a bifurcated loan was addressed and rejected in the case of *In re DaCosta;*

> The Debtors also argue that if the Bank is allowed to calculate the payments due based on the entire principal balance, both secured and unsecured, "it will ultimately recover interest over and above what it is entitled to recover, namely interest on the principal portion of the unsecured claim." The Court finds that the Debtors are attempting to do what this Court proscribed in *In re Murphy,* 175 B.R. 134 (Bankr.D.Mass.1994), namely to make monthly payments in a sum equal to the new principal amount of the Bank's claim amortized over the life of the plan and beyond, rather than the regular monthly payment. Accordingly, the Court reiterates its holding in the companion case to Murphy, *In re Brown,* 175 B.R. 129 (Bankr.D.Mass.1994): "[t]he allowed amount of the secured portion of the mortgage claim after claim splitting under § 506(a) remains the maximum amount that the mortgage holder is entitled to recover on account of the payments by the debtor, including the arrearage payments." 175 B.R. at 134 (quoting Lundin, *supra,* at ¶ 4.55, 4-103). In other words, 11 U.S.C. § 1325(a)(5)(B)(ii) protects against the consequences the Debtors foresee.

In re DaCosta, 204 B.R. 1 at 5 (Bankr.D.Mass.1996). As the Debtor has proposed to modify HSBC's secured claim, the full crammed-down value of $123,000.00 should be paid in full during the five-year term of the Chapter 13 plan. As the Debtor has failed to include such a provision in

---

modification of the secured claim requiring repayment in full during the life of the plan); *In re McGregor*, 172 B.R. 718, 721 (Bankr. D. Mass. 1994) (if payments are changed §§ 1322[d] and 1322(a)(5) require that the secured claim be paid in full during the life of the Chapter 13 plan); *Brown v. Shorewood Fin., Inc.*, 175 B.R. 129, 133 (Bankr. D. Mass. 1994) (debtor must either pay allowed amount of secured claim in full within life of plan or cure mortgage arrears and maintain regular mortgage payments for the plan term); *In re Murphy*, 175 B.R. 134, 137 (Bankr. D. Mass 1994) (adopted analysis in *McGregor*); *In re Kheng*, 202 B.R. 538, 539 (Bankr. D. RI 1996) (agreed with *Legowski* and adopts analyses in *McGregor*, *Murphy*, and *Brown*).

her Chapter 13 plan, confirmation of the plan should be denied and the Motion to Modify should be disallowed to the extent that it seeks to recalculate the amount of the post-petition payments.

II. THE DEBTOR MUST CURE THE PRE-PETITION ARREARS IN FULL IN ORDER TO EXTEND REPAYMENT OF THE MODIFIED CLAIM BEYOND THE TERM OF THE CHAPTER 13 PLAN AND CAN NOT ALLOCATE THE ARREARS TO THE VALUE OF THE ALLOWED SECURED CLAIM ESTABLISHED BY THE COURT UNDER 11 U.S.C. §506(a)

The Debtor's Amended Chapter 13 Plan attempts to bifurcate HSBC's claim into a secured claim of $123,000.00, the purported value of the property including the mortgage arrears, and an unsecured claim as to the $183,622.68 balance of the mortgage. The Plan provides for no distribution on unsecured claims. Additionally, the Plan allocates the entire pre-petition mortgage arrears of $51,217.06 to the secured portion of the claim thereby reducing the principal balance to $71,782.94 which is to be amortized over the remaining term of the loan. It is HSBC's position that the debtor must cure the entire pre-petition arrears in full in order to utilize 11 U.S.C. §1322(b)(5) and extend repayment of the bifurcated claim beyond the five-year term of the Plan.

An itemization of the pre-petition arrears owed to HSBC is as follows;

Itemized statement of pre-petition arrearage		
5 payments at $3,020.66 (2/08-6/08)	$	15,103.30
6 payments at $2,758.99 (7/08-12/08)	$	16,553.94
3 payments at $3,037.29 (1/09-3/09)	$	9,111.87
Accrued Late Fees	$	1,351.78
Legal Fees and Costs	$	5,702.44
Property Inspections/Preservation	$	223.75
Appraisal/BPO Fee	$	190.00
Post-Petition Pre-Confirmation Legal Fees/Costs	$	300.00
Escrow Shortage	$	4,770.08
Suspense Balance	$	(2,090.10)
TOTAL	**$**	**51,217.06**

Citing *In re Brown*, 175 B.R. 129 (Bankr.D.Mass.1994), Debtor's Memorandum in Support of Motion to Modify Secured Claim (Docket No. 22) states that the amount of the secured claim to be paid outside of the plan is reduced by the pre-petition arrears paid inside of the plan. The Debtor's interpretation of *Brown* is misplaced. The court in *Brown*, quoting Judge Keith M. Lundin's treatise, *Chapter 13 Bankruptcy*, §4.55 at 4-103 (Wiley 1994), stated as follows;

> "The allowed amount of the secured portion of the mortgage claim after splitting under §506 (a) remains the maximum amount that the mortgage holder is entitled to recover on account of the payments by the debtor, including the arrearage payments. When the sum of the principal portion of the regular monthly payments

> and the *principal portion of the arrearage payments* (emphasis added) totals the allowed amount of the secured portion of the claim, the secured claim will be paid in full."

Brown, at 134. It is clear that the portion of the pre-petition arrearage claim which is attributable to principal is the only amount that may be appropriately applied to the allowed secured claim after bifurcation.[2] The accrued interest, late charges, accrued attorneys fees and costs, property inspection and appraisal fees, as well as the escrow shortage, all of which are a component of HSBC's pre-petition arrearage claim, should not be allocated to the allowed secured claim. In fact, to do so would bestow a windfall on the debtor for failing to make fourteen months of mortgage payments prior to filing her bankruptcy petition. A similar situation was addressed in the case of *In re Cole*, 122 B.R. 943 (Bankr.E.D.Pa.1991). Citing *In re Hyden* 112 B.R. 431 (Bankr.W.D.Okla.1990), the court in *Cole* noted;

> "[a] debtor who has made all or most of the pre-petition payments due under a long-term obligation should not be placed in a worse position than a debtor who has missed all or most of the pre-petition payments simply *because* the payments were made. If we followed the Debtor's suggestion that her mortgage can be reamortized to account for its secured and unsecured portions, we *would* be rewarding her simply because she has a poor payment record. The mortgage balance and hence the unsecured portion of the Mortgagee's claim is increased solely because of the Debtor's failure to make payments"

Cole, at 951.

Furthermore, there is an established line of cases holding that a claim for pre-petition mortgage arrears is separate from the secured claim established by bifurcation under 11 U.S.C. §506(a). These cases found §506(a) to be inapplicable to a claim of mortgage arrears and

[2] See also *In re Zablonski*, 153 B.R. 604, 605 (Bankr.D.Mass.1993) ("The Debtors may obtain a discharge of the mortgage when their postfiling monthly payments of $1,254.00 total $82,000 in principal plus interest in accordance with the amortization schedule under the note applicable to the payments due postpetition")

instead held that the "secured claim" established under §506(a) refers only to the principal balance due on the underlying mortgage. *Sapos v. Provident Institution of Savings*, 967 F.2d 918, 927-928 (3d Cir.1992) (specific holding permitting modification of mortgage reversed by *Nobelman v. American Sav. Bank*, 508 U.S. 324 (1993)); *In re Vitelli*, 93 B.R. 889 (Bankr.E.D.Pa.1988); *In re Cole*, 122 B.R. 943 (Bankr.E.D.Pa.1991); *In re Richards,* 151 B.R. 8 (Bankr.D.Mass.1993) (specific holding permitting modification of mortgage reversed by *Nobelman*). As such, the claim of HSBC should be value at no less than $123,000.00 which is the Debtor's estimate as to the fair market value of the property. The portion of the pre-petition arrears which is attributable to principal (approximately $2,000.00) may be properly allocated against the $123,000.00 claim. As the debtor is proposing to reduce the secured claim of $123,000.00 by the entire pre-petition arrearage of $51,217.06, the majority of which is interest and fees, confirmation should be denied.

III. THE DEBTORS' CHAPTER 13 PLAN IS NOT FEASIBLE IN THAT THEY HAVE INSUFFICIENT INCOME TO MAINTAIN POST-PETITION MORTGAGE PAYMENTS AND CURE THE PRE-PETITION DEFAULT

The Debtor's filed Schedule J lists her monthly net income as $1,349.00. When calculating this figure the Debtor used a monthly mortgage payment of $600.00. As discussed previously, the mortgage payment at the time the Debtor filed her bankruptcy petition was $2,840.85. Thus the Debtor has overestimated her income by $2,240.85. After factoring in the full monthly mortgage payment, the Debtor has negative monthly income of $891.85. As such, the debtor does not have the ability to fund a Chapter 13 plan and confirmation of the Amended Plan should be denied.

CONCLUSION

Wherefore, HSBC Bank U.S.A, National Association, as Trustee for Home Equity Loan Trust Series ACE 2006-HE1 requests that the court deny the Debtor's Motion to Modify Secured Claim, deny confirmation of the Debtor's Amended Chapter 13 Plan, and for such other relief as this court deems just and proper.

Respectfully submitted,

HSBC Bank U.S.A, National Association, as Trustee for Home Equity Loan Trust Series ACE 2006-HE1,
By its Attorney

/s/ Kathryn A. Fyans
Kathryn A. Fyans, Esquire
RI # 7360
HARMON LAW OFFICES, P.C.
P.O. Box 610345
Newton Highlands, MA 02461-0345
781-292-3900
617-243-4049 (fax)
ribk@harmonlaw.com

Dated: August 4, 2009

UNITED STATES BANKRUPTCY COURT
DISTRICT OF RHODE ISLAND

IN RE: Ernestina Garcia	CHAPTER 13 CASE NO. 09-10890-ANV

CERTIFICATE OF SERVICE

I, Kathryn A. Fyans, Esquire, state that on August 4, 2009, I electronically filed the foregoing Memorandum of Law with the United States Bankruptcy Court for the District of Rhode Island using the CM/ECF System. I served the foregoing document on the following CM/ECF participants:

Gary L. Donahue, Esquire, Assistant U.S. Trustee
John Boyajian, Esquire, Chapter 13 Trustee
John B. Ennis, Esquire for the Debtor

I certify that I have mailed by first class mail, postage prepaid the documents electronically filed with the Court on the following non CM/ECF participants:

/s/ Kathryn A. Fyans
Kathryn A. Fyans, Esquire
RI# 7360

Ernestina Garcia
44 Union Avenue, Unit 1
Providence, RI 02909

Recovery Management Systems Corporation
25 S.E. 2nd Avenue, Suite 1120
Miami, FL 33131

KAF//200712-0140/Garcia, Ernestina